SECTION 6: VOLUNTARY ENVIRONMENTAL SELF-AUDITING

Summary

As part of the EQC interim study on compliance and enforcement, the Council adopted HJR 10 study work plan Goal 7 which states that the council would

Investigate the role that environmental audits play in the compliance and enforcement issue. This goal will include an analysis of the immunity and confidentiality issues raised by HB 412...

The Council chose to conduct this effort through discussions between those most involved with the legislation which failed to pass during the 1995 Session.

Beginning in December 1995, a group of interested citizens formed a working group to discuss and analyze the concept of voluntary environmental self-audits as a method by which compliance with environmental regulations could be improved in the state of Montana. The incentives of providing immunity from prosecution for violations discovered through self-auditing and the provision of privilege for environmental audit report information were reviewed at length. The process was designed as a round table discussion of the policy concept and the incentive issues. The issues are complex and have significant public policy implications. There was no attempt to develop a consensus agreement between all the participants.

After considerable effort and dedicated involvement, the participants affirmed the concept of encouraging voluntary environmental self-audits. No common agreement could be reached regarding what incentives should be provided and no consensus legislation was recommended.

Background

Attachment A includes a copy of HB 412 from the 1995 Legislative Session. This was a bill intended to encourage voluntary environmental self-auditing by providing for immunity and privilege of audit information. Despite significant amendment, the bill ultimately did not pass. Also included in Attachment A is a letter from the Governor encouraging the EQC to study this issue, the EQC Compliance and Enforcement Subcommittee work plan goal and directive, and a summary of the study process that followed. Working group participants are listed in Attachment B. A chronology of activities is summarized in Attachment C.

Efforts

The working group responded to a questionnaire which summarized the various member positions on the issue of self-auditing. The responses received are shown in Attachment D. A review of the status of voluntary environmental self-auditing laws and policies in other states was conducted. The group reviewed and analyzed a January 1996 EPA self-auditing policy, developed and reviewed a modification of that policy and reviewed Montana laws regarding access to documents and privilege of

information (Attachment E). A comparison and analysis of HB 412 and the EPA January 1996 policy was conducted. The working group heard presentations on existing Montana small business compliance assistance programs and reviewed and provided written comments on a modified South Dakota self audit law (Attachment F). A revision of the South Dakota legislation was developed to incorporate written comments from the group and comments were solicited on the revision (Attachment G). The EQC received a presentation from staff and various members of the working group at a November 14, 1996 meeting.

Results

A summary of the results of the working group effort is shown in Attachment H. The working group identified several elements that should be incorporated into a self-audit policy, but could not agree on a consensus bill or policy for the state. The EQC made no recommendation on the issue of self-auditing, adopted the findings in Attachment H, acknowledged the points of agreement and disagreement, and adopted the report on the issue.

ATTACHMENT A

July 6, 1995

Jerry Noble, Chairman
Environmental Quality Council
Room 106, State Capitol
Helena, MT 59620

Dear Chairman Noble:

During the 1995 legislative session, Representative Scott Orr introduced a bill that would provide limited protection to companies the voluntarily disclose an environmental violation. This environmental self-evaluation bill, HB 412, was the focus of much attention, and although it was not approved by the Legislature, many legislators and other interested parties believed it deserved further discussion and debate.

As you are probably aware, several state have adopted some form of environmental voluntary disclosure legislation, and the EPA has recently changed its own policy in order to provide an incentive for industries to perform environmental audits and disclose violations. The incentive is a reduction in civil penalties assessed by EPA against those who disclose and correct the violations they find.

I would like to recommend to the EQC that it consider including in its interim work plan for enforcement and compliance (HJR 10) a study of and recommendation with respect to a policy on environmental self-evaluation and self-disclosure. Those whose input would be valuable to such a project include industry, environmental and public interest groups, and professional auditing firms.

Our office has quite a bit of information compiles during the discussions of HB 412 that we would gladly make available to you should you decide to study this topic.

I appreciate your consideration of this request. Please let me know if you need any further explanation.

Sincerely,

MARC RACICOT
Governor

ATTACHMENT A (cont.)

HOUSE BILL 412

1995 Legislative Session

INTRODUCED BY ORR, GROSFIELD, RYAN, HARP, FORRESTER

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LIMITED PROTECTION TO AN OWNER OR OPERATOR OF A FACILITY THAT VOLUNTARILY DISCLOSES A VIOLATION OF AN ENVIRONMENTAL LAW; AND PROVIDING FOR A VOLUNTARY ENVIRONMENTAL SELF-EVALUATION AND REPORT AND AN EVIDENTIARY PRIVILEGE FOR THE REPORT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. Section 1. Purpose. The legislature finds that protection of the environment rests principally on the public's voluntary compliance with environmental laws and that the public will benefit from incentives to VOLUNTARILY identify and remedy environmental compliance issues VIOLATIONS. The legislature also finds that limited expansion of the protection against disclosure of voluntary self-evaluations of environmental compliance and against fines and penalties will encourage voluntary activities and will improve environmental quality. The legislature further finds that [sections 1 through 7] will ARE not INTENDED TO inhibit OR BE A SUBSTITUTE FOR the exercise of the regulatory authority by those AGENCIES entrusted with protecting Montana's environment.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 7], the following definitions apply:

(1) "Environmental law" means a STATE law, administrative rule, permit condition, OR license, or local regulation or ordinance designed to protect, enhance, or restore the environment and OR natural resources in the environment.

(2) "Environmental self-evaluation" means a voluntary self-evaluation, NOT OTHERWISE REQUIRED BY LAW OR REGULATORY ACTION, of a facility or operation regulated under environmental laws or of management systems related to the facility or operation, the PRIMARY purpose of which is to identify and prevent noncompliance ON A LONG-TERM BASIS and to improve compliance with environmental laws. An environmental self-evaluation may be conducted by the owner or operator of the facility or operation, by a parent company of the owner or operator of the facility or operation, by an employee or agent of the owner, operator, or parent company, or by one or more independent contractors.

(3) "Environmental self-evaluation report" means a report that is labeled "Environmental Self-Evaluation Report: Privileged Document", or the equivalent, and that is prepared as a result of an environmental self-evaluation. An environmental self-evaluation report may MUST contain materials collected or developed for the primary purpose OF and in the course of CONDUCTING an environmental self-evaluation, including. THESE MATERIALS MAY INCLUDE but ARE not limited to field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memorandums, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys. It may also include the following:

(a) a report that is prepared by the person or entity conducting the environmental self-evaluation and that states the scope of the environmental self-evaluation, the information obtained, and conclusions

and recommendations, together with exhibits and appendices;

(b) memorandums and documents analyzing portions or all of the environmental self-evaluation report and discussing implementation issues; and

(c) an implementation plan that addresses corrective action for noncompliance, improving current compliance, and preventing future noncompliance. ALL ENVIRONMENTAL SELF-EVALUATION REPORTS MUST:

(A) INCLUDE THE DATE OR DATES ON WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS CONDUCTED; AND

(B) IDENTIFY PROPOSED CORRECTIVE ACTIONS TO RESOLVE IDENTIFIED NONCOMPLIANCE ISSUES IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS. SET OF DOCUMENTS THAT ARE PREPARED AS A RESULT OF AN ENVIRONMENTAL SELF-EVALUATION. ALL DOCUMENTS THAT ARE PART OF AN ENVIRONMENTAL SELF-EVALUATION REPORT MUST CONTAIN THE DATE OR DATES ON WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS CONDUCTED. AN ENVIRONMENTAL SELF-EVALUATION REPORT MUST:

(A) CONTAIN MATERIALS THAT WERE COLLECTED OR DEVELOPED FOR THE PRIMARY PURPOSE OF AND IN THE COURSE OF CONDUCTING AN ENVIRONMENTAL SELF-EVALUATION AND THAT MAY INCLUDE BUT ARE NOT LIMITED TO FIELD NOTES AND RECORDS OF OBSERVATIONS, FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, DRAFTS, MEMORANDUMS, DRAWINGS, PHOTOGRAPHS, COMPUTER-GENERATED OR ELECTRONICALLY RECORDED INFORMATION, MAPS, CHARTS, GRAPHS, AND SURVEYS;

(B) STATE THE SCOPE OF THE ENVIRONMENTAL SELF-EVALUATION, THE INFORMATION OBTAINED, AND CONCLUSIONS AND RECOMMENDATIONS WITH A REFERENCE TO SUPPORTING DATA OR SUPPORTING INFORMATION THAT IS TO BE GENERATED OR THAT HAS ALREADY BEEN GENERATED FOR PURPOSE OF THE REPORT;

(C) IDENTIFY PROPOSED ACTIONS TO RESOLVE IDENTIFIED VIOLATIONS IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS; AND

(D) INDICATE IDENTIFIED VIOLATIONS THAT HAVE BEEN RESOLVED OR INDICATE THAT A PLAN HAS BEEN IMPLEMENTED TO RESOLVE THE VIOLATIONS IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS.

(4) "Voluntarily disclosed violation" means a disclosure:

(a) of a violation, the knowledge of which arises out BECAUSE of an environmental self-evaluation;

(b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

(c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

(d) in which the person or entity making the disclosure initiates action to resolve THE VIOLATION in a reasonably diligent manner AND CORRECTS THE VIOLATION ACCORDING TO THE COMPLIANCE PLAN APPROVED BY THE REGULATORY AGENCY SUBMITS TO THE APPROPRIATE REGULATORY AGENCY, IN WRITING, THE FOLLOWING INFORMATION:

(I) THE DATE OF THE SELF-EVALUATION THAT IDENTIFIED THE VIOLATIONS;

(II) A DESCRIPTION OF THE VIOLATION, INCLUDING ALL DATA PERTINENT TO THE DETERMINATION THAT A VIOLATION EXISTED;

(III) THE ACTION BEING UNDERTAKEN TO CORRECT THE VIOLATION;

(IV) AN ESTIMATED TIMETABLE FOR CORRECTING THE VIOLATION; AND

(V) A COMMITMENT TO DILIGENT RESOLUTION OF THE VIOLATION;

(e) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation AND RESOLUTION of the issues VIOLATIONS identified in the disclosure PURSUANT TO APPLICABLE ENVIRONMENTAL LAWS; and

(f) that is not otherwise required by law, PERMIT, ORDER, OR RULE to be reported to a regulatory authority.

NEW SECTION. Section 3. Limited privilege for voluntary self-evaluations. (1) Subject to the limitations described in [section 4], an environmental self-evaluation report is privileged and is not discoverable or admissible as evidence in a civil, criminal, or administrative proceeding.

(2) Unless disclosure constituted a waiver of the privilege under [section 4(4)], a person who or entity that conducted an environmental self-evaluation OR PREPARED AN ENVIRONMENTAL SELF-EVALUATION REPORT or ANY PERSON OR ENTITY IDENTIFIED IN [SECTION 4(2)] to whom the results were disclosed cannot be compelled to testify regarding any matter that was the subject of the environmental self-evaluation and REPORT OR ANY MATTER that is addressed in OR the environmental self-evaluation report.

NEW SECTION. Section 4. Limitations on privilege for environmental self-evaluation. (1) The privilege granted by [section 3] does not apply to the extent that it is waived by the owner or operator of a facility or operation at which an environmental self-evaluation was conducted OR TO THE EXTENT THAT THE OWNER OR OPERATOR CONSENTS TO DISCLOSURE.

(2) Disclosure of the environmental self-evaluation report or any information generated by BECAUSE OF the environmental self-evaluation under the following circumstances does not constitute a waiver of the privilege granted by [section 3]:

(a) disclosure to:

(i) an employee of the owner or operator of the facility or operation evaluated;

(ii) an employee of a parent company of the owner or operator of the facility or operation evaluated;

(iii) an agent or legal representative of the owner, operator, or parent company; or

(iv) an independent contractor retained by the owner, operator, or parent company to address an issue or issues raised IDENTIFIED by the environmental self-evaluation REPORT;

(b) disclosure made under the terms of a confidentiality agreement between the owner or operator OR THE OWNER'S OR OPERATOR'S AGENT and a potential purchaser OR THE PURCHASER'S AGENT of the facility or operation; or

(c) disclosure made under the terms of a LAWFUL confidentiality agreement between governmental officials and the owner or operator.

(3) In a civil, criminal, or administrative proceeding, a court or administrative tribunal BODY of record, after an in camera review consistent with the Montana Rules of Civil Procedure, shall require disclosure of material THE REPORT for which the privilege described in [section 3] is asserted if the court or administrative tribunal BODY determines that:

(a) the privilege is asserted for a fraudulent purpose;

(B) THE ENVIRONMENTAL SELF-EVALUATION REPORT WAS PREPARED TO AVOID DISCLOSURE OF INFORMATION:

(I) IN AN INVESTIGATION OR IN AN ADMINISTRATIVE OR JUDICIAL PROCEEDING THAT WAS UNDER WAY OR IMMINENT; OR

(II) FOR WHICH THE PERSON OR ENTITY HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED;

(b)(C) the material REPORT is not subject to the privilege; or

(c)(D) even if subject to the privilege, the material REPORT shows evidence of noncompliance

with environmental laws and shows that appropriate efforts to achieve compliance with the ENVIRONMENTAL laws were not promptly initiated and pursued TO COMPLETION TO RESOLVE THE VIOLATION IN COMPLIANCE WITH APPLICABLE ENVIRONMENTAL LAWS with reasonable diligence upon discovery of noncompliance; OR

(E) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT DEMONSTRATES A CLEAR, PRESENT, AND SUBSTANTIAL IMPENDING DANGER TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT IN AREAS OUTSIDE THE FACILITY PROPERTY.

(4) A party asserting the privilege granted by [section 3] has the burden of demonstrating the applicability of the privilege, including necessary proof PRIMA FACIE EVIDENCE that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence TOWARD COMPLETION AND INCLUDING A COMMITMENT THAT COMPLETION WILL BE ACCOMPLISHED IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS. However, a party, INCLUDING THE STATE IN A CRIMINAL PROCEEDING, seeking disclosure under subsection (3)(a), (3)(B), (3)(C), OR (3)(E) has the burden of proving that the privilege is asserted for a fraudulent purpose. In a criminal proceeding, the state has the burden of proving the reasons for disclosure set forth in subsection (3)(b) PROOF.

(5) If, based on information obtained from a source independent of an environmental self-evaluation report, the state has probable cause to believe that a criminal offense has been committed under an environmental law, the state may obtain an environmental self-evaluation report pursuant to a search warrant, criminal subpoena, or discovery, as allowed by the law governing criminal procedure. The state shall immediately place the report under seal and, may not review or disclose the contents of the report, AND SHALL NOTIFY THE OWNER OR OPERATOR OF ITS POSSESSION OF THE REPORT. Within 30 days after the state obtains the report PROVIDES NOTICE, the owner or operator that prepared the report or caused it to be prepared OR THE STATE'S ATTORNEYS may file with the appropriate court or administrative tribunal BODY a petition asserting the privilege granted by [section 3] and requesting an in camera review of the report. Failure UNLESS THE STATE FILES A PETITION, FAILURE by the owner or operator to file the petition waives the privilege. The court or administrative tribunal BODY shall IMMEDIATELY issue an order scheduling an in camera review within 45 days of the filing of the petition. The purpose of the review is to determine whether the environmental self-evaluation report or portions of it are privileged or subject to disclosure. The order must allow the state's attorneys to remove the seal from and to review the environmental self-evaluation report. The order must place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure. A state attorney may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the in camera review. However, the information used in preparation for the in camera review may not be used in any investigation or legal proceeding and must otherwise be kept confidential unless and until the information is required to be disclosed.

(6) Failure to comply with the review, disclosure, or use prohibitions of this section is grounds for EXCLUSION OR suppression, in a civil, criminal, or administrative proceeding, of any evidence arising or derived from unauthorized review, disclosure, or use. A party who fails to comply with this section has the burden of proving that proffered evidence did not arise from and was not derived from unauthorized activity.

(7) The parties may at any time stipulate to entry of an order directing that specific information contained in ALL OR A PORTION OF an environmental self-evaluation report is or is not subject to the privilege granted by [section 3].

(8) In making a disclosure determination, the court or administrative tribunal BODY may compel the disclosure only of those portions of an environmental self-evaluation report that are NOT

PRIVILEGED AND ARE relevant to issues in dispute in the proceeding.

NEW SECTION. Section 5. Exceptions to the environmental self-evaluation privilege. The privilege granted by [section 3] does not extend to:

(1) documents, communications, data, reports, or other information required to be collected, developed, maintained, or reported to a regulatory agency pursuant to environmental laws;

(2) information obtained by observation, sampling, or monitoring by a regulatory agency, EXCEPT TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE; or

(3) information obtained BY A REGULATORY AGENCY from a source independent of the environmental self-evaluation OR, EXCEPT TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE;

(4) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF THE ENVIRONMENTAL SELF-EVALUATION AND INDEPENDENT OF THE ENVIRONMENTAL SELF-EVALUATION REPORT; OR

(5) ANY INFORMATION NOT PRIVILEGED, PURSUANT TO [SECTION 3] OR OTHERWISE, THAT IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR REGULAR PRACTICE.;

(6) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT THAT IS RELEVANT IN A CIVIL ACTION FOR ALLEGED DAMAGE TO REAL PROPERTY OR TO TANGIBLE PERSONAL PROPERTY IN AREAS OUTSIDE OF THE FACILITY PROPERTY PROVIDED THAT THE CAUSES OF ACTION ASSERTED ARE NOT FOR ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS AND THAT ONLY THAT PORTION OF THE REPORT MAY BE DISCLOSED THAT IS RELEVANT TO THE ACTION; OR

(7) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT THAT IS RELEVANT IN A CIVIL ACTION FOR ALLEGED PERSONAL INJURY PROVIDED THAT THE CAUSES OF ACTION ASSERTED ARE NOT FOR ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS AND THAT ONLY THAT PORTION OF THE REPORT MAY BE DISCLOSED THAT IS RELEVANT TO THAT ACTION.

NEW SECTION. Section 6. Preservation of other privileges. [Sections 1 through 7] do not limit, EXPAND, waive, or abrogate the scope or nature of any statutory or common-law privilege, including, without limitation, the work product doctrine and the attorney-client privilege.

NEW SECTION. Section 7. Limited protection for voluntary disclosures of violation. (1) A civil, criminal, or administrative fine or other penalty may not be SOUGHT OR imposed by a court or administrative tribunal BODY for a voluntarily disclosed violation of an environmental law, EXCEPT FOR A VIOLATION OF TITLE 82, CHAPTER 4, PART 1 OR 2, FIRST MADE KNOWN ONLY BY THE ENTITY CONDUCTING THE ENVIRONMENTAL SELF-EVALUATION, unless:

(1)(A) the violation was intentionally and willfully committed by the person or entity making the disclosure;

(2)(B) action to correct the violation was not initiated within a reasonable period of time DOES NOT MEET THE REQUIREMENTS OF [SECTION 2(4)(D)]; or

(3)(C) the violation resulted in significant environmental harm or a significant threat to public health. HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT A CLEAR, SUBSTANTIAL, AND IMMEDIATE THREAT OF ACTUAL HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT.

(2) THE PERSON OR ENTITY SHALL PROVIDE INFORMATION IN WRITING SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE REGULATORY AUTHORITY OR WITHIN A

REASONABLE TIME AFTER DISCLOSURE IS MADE. ALL INFORMATION SUBMITTED TO A REGULATORY AGENCY REGARDING A VOLUNTARILY DISCLOSED VIOLATION IS PUBLIC INFORMATION.

(3) THE ELIMINATION OF CIVIL, CRIMINAL, OR ADMINISTRATIVE PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR AN ADMINISTRATIVE TRIBUNAL BODY TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT, THAT WHEN TAKEN TOGETHER ARE SERIOUS, AND THAT WERE BECAUSE OF SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS WITHIN THE 3-YEAR PERIOD PRIOR TO THE DATE OF DISCLOSURE.

NEW SECTION. SECTION 8. APPLICABILITY. [THIS ACT] APPLIES TO:

(1) ONLY THOSE ENVIRONMENTAL SELF-EVALUATIONS THAT RESULT IN ENVIRONMENTAL SELF-EVALUATION REPORTS;

(2) VOLUNTARILY DISCLOSED VIOLATIONS THAT ARE DISCLOSED AFTER [THE EFFECTIVE DATE OF THIS ACT]; AND

(3) ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED ON OR AFTER [THE EFFECTIVE DATE OF THIS ACT]. (1) THE EVIDENTIARY PRIVILEGE CREATED BY [THIS ACT] APPLIES TO ENVIRONMENTAL SELF-EVALUATION REPORTS THAT ARE PREPARED AS A RESULT OF ENVIRONMENTAL SELF-EVALUATIONS AFTER [THE EFFECTIVE DATE OF THIS ACT] AND BEFORE [THE TERMINATION DATE OF THIS ACT].

(2) THE LIMITED PROTECTION FOR VOLUNTARY DISCLOSURES CREATED BY [THIS ACT] APPLIES TO VOLUNTARY DISCLOSURES THAT ARE MADE DURING THE PERIOD BEGINNING ON [THE EFFECTIVE DATE OF THIS ACT] AND ENDING ON [THE TERMINATION DATE OF THIS ACT].

(3) [THIS ACT] APPLIES TO ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED ON OR AFTER [THE EFFECTIVE DATE OF THIS ACT].

(4) ENVIRONMENTAL SELF-EVALUATION REPORTS THAT ARE PRIVILEGED UNDER [THIS ACT] AND VOLUNTARY DISCLOSURES THAT ARE PROTECTED UNDER [THIS ACT] MUST REMAIN PRIVILEGED AND PROTECTED AFTER [THE TERMINATION DATE OF THIS ACT].

NEW SECTION. SECTION 9. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND APPROVAL.

NEW SECTION. SECTION 10. TERMINATION. [THIS ACT] TERMINATES JUNE 30, 2001.

ATTACHMENT A (cont.)

GOAL AND STUDY PROCESS

Taken from the September 1, 1995 Environmental Quality Council's HJR 10 Compliance and Enforcement Study memo describing study goals, options, and processes is the following Council imposed directive:

Goal 7: Investigate the role that environmental audits play in the compliance and enforcement issue. This goal will include an analysis of the immunity and confidentiality issues raised by HB 412 which failed to pass during the 1995 Session.

Approach: The Council will analyze the issues raised during the HB 412 debate and also draw from recent EPA and other state action on this issue. Again, this issue would require extensive public and agency involvement.

Process: This issue, complex but narrowly defined, may be appropriate for a thorough analysis by a subcommittee or similar Council subunit."

Environmental Self Audit Working Group Process Summary

November 1995 - November 1996

33 persons on mailing list
20 active participants

- Held 4 meetings: December 1995, February, April, and July 1996.
- Provided a written position questionnaire.
- Provided written comments on proposed initiatives twice.
    - Reviewed other states' self audit legislative initiatives.
    - Reviewed EPA self audit policy.
    - Reviewed Montana's confidentiality/trade secret provisions.
    - Reviewed a modified EPA policy for Montana statutes.
    - Reviewed case histories and hypothetical audit examples with small business assistance programs.
    - Discussed the South Dakota self audit legislation and provided written comments.
    - Reviewed modified South Dakota legislation and provided written comments.

ATTACHMENT B

ENVIRONMENTAL SELF AUDIT WORKING GROUP..1996

Anne Hedges, MEIC, Helena, MT 59601
David Owen, Montana Chamber of Commerce, Helena,
Jeff Barber/Julia Page/Ted Lange, Northern Plains Resource Council, Billings
Don Allen, Helena
Eric Finke, EPA Montana Office, Helena
Sen. Steve Doherty, Great Falls
Susan Callaghan/Mike Pichette, Montana Power Company, Butte
Tom Ebzery, Billings
George Schunk, MT Department of Justice, Helena
Judy Browning, Office of the Governor
Peggy Trenk, WETA, Helena
Ray Martinich, Montana Refining Co., Great Falls
Rep. Scott Orr, Libby
Richard Parks, NPRC, Gardiner
Robert Booher, Dept. Env. Quality, Helena
Pam Langley, Helena
Russ Hill, Montana Trial Lawyer's Association, Helena
J.R. McPherson, PacifiCorp, Lake Oswego, OR.
Janet Ellis, Montana Audubon Council, Helena
John North, Dept. Environmental Quality, Helena
John Arrigo, Dept. Environmental Quality, Helena
John Schontz, Helena
Karl Englund, Missoula
Mike Voegel, MSU Extension Service, Bozeman
Todd McFadden, MSU Extension Service, Bozeman
Mark Lambrecht, Small Business Assistance, Dept. Commerce, Helena
Page Dringman, Helena
Russ Ritter, Washington Corp.,Helena
Debbie Smith, Helena,
Dick Juntunen, Clancy
Frank Crowley, Helena
Gail Abercrombie, MT Petroleum Assn.,Helena
Helen Christensen, MT State AFL-CIO, Helena

ATTACHMENT C

ENVIRONMENTAL SELF AUDIT WORKING GROUP CHRONOLOGY

CHRONOLOGY OF ACTIVITIES

- November 17, 1995.
  At the direction of the Environmental Quality Council, its staff wrote to interested and affected parties who testified regarding HB 412 during the 1995 Legislative Session suggesting a review and analysis of the issues.

  * **Purpose:** Referencing HB 412, a July 6, 1995 letter from Governor Racicot to the EQC recommended that the EQC Compliance and Enforcement Subcommittee conduct **"a study of and recommendation with respect to a policy on environmental self-evaluation and self-disclosure"** as part of the Council's required review of state environmental compliance and enforcement programs (HJR 10).

  * The EQC Compliance and Enforcement Subcommittee adopted HJR 10 study workplan Goal 7 which states that the council would **"Investigate the role that environmental audits play in the compliance and enforcement issue. This goal will include an analysis of the immunity and confidentiality issues raised by HB 412..."**

  * HJR 10 requests that the EQC complete its study and **report its finding and recommendations** to the 55th Legislature in 1997.

- MEETING #1 December 1, 1995 Scoping Meeting.
  A decision was made by the interested parties to form a working group to conduct an analysis of the issues during the course of two more meetings. **A report would be made to the EQC's Compliance and Enforcement study Subcommittee as to whether or not progress could be made.** Next meeting scheduled for February 15.

- December 21, 1995.
  At the request of the working group, EQC staff developed and mailed a position sampling questionnaire to all working group members.

- February 1, 1996.
  EQC staff provided copies and summaries of working group member position statements, summary information of self audit legislation from other states, and a copy of a December 22, 1995 EPA self audit policy.

- MEETING #2 February 15, 1996
  The working group decided to review the EPA policy further, to determine whether it could be utilized within Montana's current statutes, and to investigate a trade secrets type access limitation for audit documents. Next meeting scheduled for April 10.

- April 3, 1996.
  As requested, the EQC staff provided the working group with a rough draft discussion document which sought to integrate the EPA self audit policy into the Montana situation, identifying needed changes to state law. A review of state laws on confidentiality was also provided.

- MEETING #3 April 10, 1996
  The working group reviewed the EPA policy and discussed its merits as policy or as statute for Montana. The group had several questions about the meaning and interpretation of the policy and whether or not it was adequate to address the issue of self auditing in this state. A decision was made to hold another meeting. Group members volunteered to develop some "evidentiary protection" language for the policy and create some hypothetical audit situations to test against the EPA policy.

- MEETING #4 July 30, 1996
  Presentations were made by the DEQ Small Business Ombudsman and the MSU Extension Service pollution prevention small business assistance office. Hypothetical compliance inspection situations were discussed in the current context and with the proposed self audit policy in place. The South Dakota self audit law was discussed. One of the working group members volunteered to modify that legislation incorporating written comments and concerns from other group members.

- August 16, 1996 - Staff received written comments on South Dakota self audit law and forwarded them to Susan Callaghan for incorporation into the document and revision.

- October 18, 1996 - Revised South Dakota self audit law received October 16. EQC staff provided copies to working group members with request for written comments by November 1.

- November 14, 1996 - EQC staff and working group members present results to EQC Subcommittee on Compliance and Enforcement.

ATTACHMENT D

SUMMARY OF WORKING GROUP MEMBER POLICY POSITIONS; JANUARY 1996

RESPONSE BY	ENCOURAGE SELF AUDITS?			PROVIDE IMMUNITY?			PROVIDE PRIVILEGE?		USE HB 412 AS A BEGINNING?	
	GENER-ALLY	BY LAW	BY POLICY	YES	NO	NOT CRIMINAL	YES	NO	YES	NO
George Schunk Attorney General's office	YES		X			X		X		
Don Allen Wood Products Association	YES	X		X			X		X	
Karl Englund	YES		X		X	X		X		
Peggy Trenk West. Env. Trade Association	YES	X		X			X		X	
Susan Callahan Montana Power Company	YES	X		X		X	X		X	
Judy Browning Governor's Office	YES	X		X		X		X		
Anne Hedges MT Env. Information Center	YES		X		X	X		X		X
Russell Hill MT. Trial Lawyer's Assn.	YES	X			X	X		X		
Rep. Scott Orr	YES	X		X						
Tom Ebzery Exxon Co.	YES	X		X		?	X		X	
Richard Parks\Ted Lange N. Plains Resource Council	YES		X		X	X		X		X
Ray Martinich Montana Refining Co.	YES	X		X			X			

This information was assimilated from the responses to the questionnaire. No attempt was made to interpret responses by implication and force them into this matrix with the exception of a "no" response to the question of immunity, which automatically translated into a "no" response on the issue of criminal immunity. Many responses came associated with qualifiers; "yes, except" or "no, unless" type responses. Unfortunately, the limits of matrix space leave us with only the cold harsh yes or no's. The compromise appears to be in the qualifiers which you can discuss at length on Feb. 15th.

ATTACHMENT E

(CITE AS: 60 FR 66706) NOTICES ***ENVIRONMENTAL PROTECTION AGENCY***

INCENTIVES for SELF-POLICING: Discovery, Disclosure, Correction and Prevention of Violations

Noticed: Friday, December 22, 1995
ACTION: Final Policy Statement.

SUMMARY: The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

DATES: **This policy is effective January 22, 1996.**

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:
I. Explanation of Policy

A. Introduction

The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct. The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits. EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA received over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".)

Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the regulated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. (A copy of the Price-Waterhouse survey is contained in the Docket as document VIII-A-76.)

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

D. INCENTIVES for SELF-POLICING

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self- correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

Under Section C(1) of the policy, EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected. Gravity-based penalties will also be waived for violations found through any documented procedure for self-policing, where the company can show that it has a compliance management program that meets the criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA

has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II-F-39, II-F-28, and II-F-18).

2. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity- based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this will encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable and essential to achieving compliance. This change also responds to requests for greater clarity and predictability.

3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations. It will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

4. No Routine Requests for Audits

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(1)), EPA will reduce gravity- based penalties by 75%.

1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(1), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or
(b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations.
The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.
Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.
Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, e.g., II-F-39, II-E-18, and II-G-18 in the Docket.)
EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.
The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.
The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.
The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, e.g., II-C-48 in the Docket).
The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below).
Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in

furthering the public interest in timely and accurate reports from the regulated community.

Under Section D(4), disclosure of the violation should be made within 10 days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred ...." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section H of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation (including responding to any spill and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (e.g., where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"--a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

6. No Repeat Violations

In response to requests from commenters (see, e.g., II-F-39 and II-G-18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self- policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, e.g., II-F-39 and II-G-18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II-E- 60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons: 1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, e.g., United States v. Dexter, 132 F.R.D. 8, 9-10 (D.Conn. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information--such as health studies or contaminated sediment data--and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether

such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "in camera" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups. (See, e.g., Docket, II-C-21, II-C-28, II-C-52, IV-G- 10, II-C-25, II-C-33, II-C-52, II-C-48, and II-G-13 through II-G-24.)

G. Effect on States

The final policy reflects EPA's desire to develop fair and effective INCENTIVES for SELF-POLICING that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result, EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.

H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consistency in application. For example, the Agency will make public any compliance agreements reached under this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. While EPA is taking steps to ensure consistency and predictability and believes that it will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.

II. Statement of Policy: INCENTIVES for SELF-POLICING

Discovery, Disclosure, Correction and Prevention

A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

B. Definitions

For purposes of this policy, the following definitions apply: "Environmental Audit" has the definition given to it in EPA's 1986 audit policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;
(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.
"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.
"Gravity-based penalties" are that portion of a penalty over and above the economic benefit., i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium).
"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C. INCENTIVES for SELF-POLICING

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) through D(9) below.

3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:
(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or
(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.
(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or
(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:
(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;
(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff
The violation must also be identified and disclosed by the regulated entity prior to:
(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;
(b) notice of a citizen suit;
(c) the filing of a complaint by a third party;
(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
(e) imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;
7. No Repeat Violations
The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:
(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

E. Economic Benefit

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.
(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.
(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.
(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:
(a) changes in compliance behavior within the regulated community, including improved compliance rates;
(b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;
(c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and

promoting public disclosure;
(d) consistency among state programs that provide incentives for voluntary compliance.
EPA will make the study available to the public.
(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This policy is effective January 22, 1996.
Dated: December 18, 1995.
Steven A. Herman,
Assistant Administrator for Enforcement and Compliance Assurance.

ATTACHMENT E (cont.)

MODIFIED EPA SELF AUDIT POLICY AND ANALYSIS OF PRIVILEGE

SECTION 1. Title. POLICY TO ENCOURAGE VOLUNTARY COMPLIANCE BY MEANS OF ENVIRONMENTAL AUDITS

SECTION 2. Montana Authority.

Clean Air Act of Montana 75-2-101 *et seq.,* MCA

Asbestos Control Act 75-2-501 *et seq.*, MCA

Montana Radon Control Act 75-3-601 *et seq*., MCA

Montana Water Quality Statutes 75-5-101 *et seq.*, MCA

Public Water Supply Statutes 75-6-101 *et seq.*, MCA

Montana Solid Waste Act 75-10-201 *et seq.*, MCA

Montana Hazardous Waste and Underground Storage Tank Act 75-10-401 *et seq.*, MCA

Motor Vehicle Recycling and Disposal Statutes 75-10-501 *et seq.*, MCA

State Superfund Statutes 75-10-701 *et seq.*, MCA

Montana Megalandfill Siting Act 75-10-901 *et seq.*, MCA

Infectious Waste Management Act 75-10-1001 *et seq.*, MCA

Montana Underground Storage Tank Installer Licensing and Permitting Act 75-11-201 *et seq.*, MCA

Montana Strip and Underground Mine Reclamation Act 82-4-201 *et seq.*, MCA

Montana Metal Mine Reclamation Act 82-4-301 *et seq.*, MCA

Montana Opencut Mining Act 82-4-401 *et seq*., MCA

Montana Agricultural Chemical Ground Water Protection Act 80-15-101 *et seq.*, MCA

Montana Pesticides Act 80-8-101 *et seq.*, MCA

SECTION 3. Policy. It is the policy of this state to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of state environmental requirements.

SECTION 4. Definitions. Unless the context requires otherwise, in this policy, the following definitions apply:

(1) "Environmental audit" means a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

(2) "Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.

(3) "Environmental requirement" means any legally enforceable obligations including those environmental laws and regulations and those in permits or licenses issued under the environmental laws and regulations.

(4) "Department" means the department of environmental quality provided for in 2-15-3501 or the department of agriculture provided for in 2-15-3001.

(5) "Due diligence" means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through at least the following elements:

(a) compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluations of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement though appropriate disciplinary mechanisms; and

(f) procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

(6) "Gravity-based penalty" means the punitive portion of the penalty rather than that portion representing an economic gain from non-compliance.

(7) "Regulated entity" means any entity, including a federal, state, or municipal agency or facility, regulated under state environmental requirements.

SECTION 6. Incentives for Environmental Auditing.

To encourage regulated entities to perform environmental audits, the department shall:

(1) waive 100% of the gravity component of the penalty where the violation was found through an environmental audit or where due diligence can be demonstrated, and if all of the limitations in [**SECTION 7**] are met;

(2) waive 75% of the gravity component where the violation was discovered by any other voluntary means, if the limitations on incentives listed in [**SECTION 7 subsection 7(2) through (9)**] are met. The department retains the full discretion to recover the economic benefit, but the department may waive the economic benefit if all the conditions in [**SECTION 7**] are met and the economic benefit is insignificant.

(3) not recommend for criminal prosecution a regulated entity that voluntarily discovers and promptly discloses and corrects violations through environmental audits or due diligence, and meets all limitations set out in [**SECTION 7**], unless there is:

(a) a prevalent management philosophy or practice that conceals or condones violations; or

(b) there is a high-level official's conscious involvement or willful blindness to the violations; and

(4) not request or use an environmental audit report to initiate a civil or criminal investigation of a regulated entity.

SECTION 7. Limitations on incentives for environmental audits. (1) The violation must have been discovered during a systematic, objective, and periodic environmental audit, or a documented systematic procedure which reflects due diligence. The department may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made public.

(2) The violation must have been discovered voluntarily, and not through a monitoring, sampling or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or by consent agreement.

(3) The violation must be disclosed within 10 days of discovery that a violation has or may have occurred and the disclosure must be submitted in writing to the department.

(4) The violation must have been discovered prior to:

(a) an inspection or investigation by the department or regulatory agency, or the issuance of an information request;

(b) the filing of a complaint by a third party;

(c) the reporting of the violation to the department or another governmental agency by a "whistleblower"; or

(d) the imminent discovery by the department or a regulatory agency.

(5) The regulated entity must correct the violation within 60 days, and remedy any harm to the environment or human health. If more than 60 days is needed to correct the violation, the regulated entity must notify the department in writing before the 60 day period has elapsed. Where appropriate, the department may require that to satisfy subsections (5) and (6), a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

(6) The regulated entity must take steps to prevent recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts.

(7) The violation must not have occurred previously within the last 3 years, or be part of a pattern of violations by the facility's parent organization within the last 5 years. For purposes of this subsection a violation is:

(a) any violation of federal, state, or local environmental requirements identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from the Environmental Protection Agency, the department, a state agency or local agency.

(8) The violation did not:

(a) result in any serious actual harm or present an imminent and substantial endangerment; or

(b) violate the terms of any judicial or administrative order or consent agreement.

(9) The regulated entity cooperates as requested by the department and provides such information as is necessary and requested by the department to determine applicability of this policy.

SECTION 8. Amended Statutory Sections.

(1) Section 82-4-361, MCA, is amended to read:

"**82-4-361. Violation -- penalties -- waiver.** (1) (a) Except as provided in subsections (1)(b) and (2), a civil penalty of not less than $100 or more than $1,000 for each of the following violations, an additional civil penalty of not less than $100 or more than $1,000 for each day during which the violation continues, and an injunction from continuing the violation may be imposed against:

(i) a person or operator who violates a provision of this part, a rule or order adopted under this part, or a term or condition of a permit; or

(ii) any director, officer, or agent of a corporation who willfully authorizes, orders, or carries out a violation of a provision of this part, a rule or order adopted under this part, or a term or condition of a permit.

(b) If the violation created an imminent danger to the health or safety of the public or caused significant environmental harm, the maximum penalty is $5,000 for each day of violation.

(2) (a) The department may bring an action for a restraining order or a temporary or permanent injunction against an operator or other person violating or threatening to violate an order adopted under this part.

(b) The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent

potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection.

(c) The civil penalties provided for in this section may be waived for a violation that is discovered through an environmental audit that is conducted puruant to the requirements in [SECTIONS 1 though 7] of [this policy].

(3) The department shall notify the person or operator of the violation. The department shall issue a statement of proposed penalty within 30 days after notice of the violation. The person or operator, by filing a written request within 20 days of receipt of the notice of proposed penalty, is entitled to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be assessed is proper. After the hearing or after the time for requesting a hearing has expired, the board shall make findings of fact and issue a written decision as to the occurrence of the violation and whether the amount of penalty is warranted. The board shall order the payment of a penalty in that amount. The person or operator shall remit the amount of the penalty or petition for judicial review within 30 days of receipt of the order. A person or operator who fails to request the hearing provided for in this subsection or who fails to petition for judicial review within 30 days of receipt of the order forfeits that person's or operator's right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an action brought by the department."

{*Internal References to 82-4-361:*
82-4-305 *82-4-331* *82-4-335*}

2. Section 82-4-441, MCA, is amended to read:

"**82-4-441. Penalty -- enforcement.** (1) A person who violates any of the provisions of this part, rules adopted under this part, or provisions of a contract for reclamation:

(a) shall pay a civil penalty of not less than $100 or more than $1,000 for the violation;

(b) shall pay an additional civil penalty of not less than $100 or more than $1,000 for each day during which a violation continues following the service of notice of the violation; and

(c) may be enjoined from continuing the violation as provided in this section.

(2) The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection.

(3) The civil penalties provided for in this section may be waived for a violation that is discovered through an environmental audit that is conducted pursuant to the requirements in [SECTIONS 1 though 7] of [this policy].

~~(3)~~(4) The department shall notify the person or operator of the violation. The person or operator is entitled, by filing a written request within 20 days of receipt of the notice of violation, to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be imposed is proper. The department shall issue a statement of proposed penalty no more than 10 days after notice of violation. After the hearing or after the time for requesting a hearing has expired, the board shall make findings of fact, issue a written decision as to the occurrence of the violation and the amount of penalty warranted, and order the payment of a penalty in that amount. The person or operator shall remit the amount of the penalty within 30 days of the order. If the person or operator wishes to obtain judicial review of the assessment, the person or operator shall submit with the penalty a statement that the penalty is being paid under protest and the department shall hold the payment in escrow until judicial review is complete. A person or operator who fails to request and submit testimony at the hearing provided for in this subsection or who fails to pay the assessed penalty under protest within 30 days of the order assessing the penalty forfeits the right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an action brought by the department in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county in which the opencut mine is located.

~~(4)~~(5) The department may bring an action to enjoin an operator or other person violating or threatening to violate this part, rules adopted pursuant to this part, or a contract made pursuant to this part in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county in which the opencut mine is located."

{*Internal References to 82-4-441: None.*}

SECTION 9. Applicability. This policy applies to the assessment of penalties for any violations under the statutes listed in [**SECTION 2**].

IMMUNITY ANALYSIS:
PROTECTION FROM CIVIL, CRIMINAL, OR ADMINISTRATIVE FINE OR PENALTY FOR VOLUNTARY DISCLOSURES.

EQC staff did not develop a specific "discussion" document for this topic. It might be helpful for the working group to compare the protections afforded in the EPA policy set out above and the protections set out in House Bill 412 (HB 412) below.

The environmental audit policy outlined above offers penalty mitigation incentives to regulated entities that detect and correct violations on their own, as long as they are detected by means of an environmental audit or any other voluntary, systematic review that demonstrates "due diligence"; they are disclosed to department; and they meet specific conditions. The department may not request audit reports to initiate civil or criminal investigations.

HB 412 granted limited protection for voluntary disclosures of violations. HB 412 prohibited a civil, criminal, or administrative fine or other penalty from being imposed by a court or administrative body for voluntarily disclosed violations of environmental law with specific limitations. The relevant sections of HB 412 are set out below.

NEW SECTION. **Section a. Limited protection for voluntary disclosures of violation.** (1) A civil, criminal, or administrative fine or other penalty may not be SOUGHT OR imposed by a court or administrative ~~tribunal~~ BODY for a voluntarily disclosed violation of an environmental law, EXCEPT FOR A VIOLATION OF TITLE 82, CHAPTER 4, PART 1 OR 2, FIRST MADE KNOWN ONLY BY THE ENTITY CONDUCTING THE ENVIRONMENTAL SELF-EVALUATION, unless:

~~(1)~~(A) the violation was intentionally and willfully committed by the person or entity making the disclosure;

~~(2)~~(B) action to correct the violation ~~was not initiated within a reasonable period of time~~ DOES NOT MEET THE REQUIREMENTS OF [SECTION 2(4)(D)]; or

~~(3)~~(C) the violation resulted in ~~significant environmental harm or a significant threat to public health.~~ ~~HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT~~ A CLEAR, SUBSTANTIAL, AND IMMEDIATE THREAT OF ACTUAL HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT.

(2) THE PERSON OR ENTITY SHALL PROVIDE INFORMATION IN WRITING SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE REGULATORY AUTHORITY OR WITHIN A REASONABLE TIME AFTER DISCLOSURE IS MADE. ALL INFORMATION SUBMITTED TO A REGULATORY AGENCY REGARDING A VOLUNTARILY DISCLOSED VIOLATION IS PUBLIC INFORMATION.

(3) THE ELIMINATION OF CIVIL, CRIMINAL, OR ADMINISTRATIVE PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR AN ADMINISTRATIVE ~~TRIBUNAL~~ BODY TO HAVE COMMITTED ~~SERIOUS~~ VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT, THAT WHEN TAKEN TOGETHER ARE SERIOUS, AND THAT WERE BECAUSE OF SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS WITHIN THE 3-YEAR PERIOD PRIOR TO THE DATE OF DISCLOSURE.

SECTION 2 (4)

(4) "Voluntarily disclosed violation" means a disclosure:

(a) of a violation, the knowledge of which arises ~~out~~ BECAUSE of an environmental self-evaluation;

(b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

(c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

(d) in which the person or entity making the disclosure initiates action to resolve THE VIOLATION in a ~~reasonably~~ diligent manner AND ~~CORRECTS THE VIOLATION ACCORDING TO THE COMPLIANCE PLAN APPROVED BY THE REGULATORY AGENCY~~ SUBMITS TO THE APPROPRIATE REGULATORY AGENCY, IN WRITING, THE FOLLOWING INFORMATION:

(I) THE DATE OF THE SELF-EVALUATION THAT IDENTIFIED THE VIOLATIONS;

(II) A DESCRIPTION OF THE VIOLATION, INCLUDING ALL DATA PERTINENT TO THE DETERMINATION THAT A VIOLATION EXISTED;

(III) THE ACTION BEING UNDERTAKEN TO CORRECT THE VIOLATION;

(IV) AN ESTIMATED TIMETABLE FOR CORRECTING THE VIOLATION; AND

(V) A COMMITMENT TO DILIGENT RESOLUTION OF THE VIOLATION;

(e) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation AND RESOLUTION of the ~~issues~~ VIOLATIONS identified in the disclosure PURSUANT TO APPLICABLE ENVIRONMENTAL LAWS; and

(f) that is not otherwise required by law, PERMIT, ORDER, OR RULE to be reported to a regulatory authority.

PRIVILEGE ANALYSIS
LIMITED PROTECTION OF ENVIRONMENTAL AUDIT DOCUMENTS.

Again, the EQC staff did not develop a specific "discussion" document for this topic We did search the Montana statutes for the terms "privilege, privacy, public records, secrecy, confidentiality, trade secrets," and others. We also did a cursory review of court decisions on these topics and obtained and reviewed other state legislation. What we found is set out below for your review and analysis.

Notations:

The term "privilege" in the context of Montana law is typically reserved for the protection of the privacy of an individual in communications with other individuals such as a physician, attorney, spouse, psychiatrist or clergyman. In the legal context of the Rules of Civil Procedure, matters which are "privileged" are not subject to discovery.

The term "trade secrets" in the context of Montana law is typically reserved for the protection of one's economic interests which would otherwise be damaged by the release of the information required to be provided to the government.

The term "confidential" in the context of Montana law is typically reserved for matters which are either individual privacy matters or considered to be trade secrets having economic value.

The Right to Know provisions of the Montana Constitution generally require government agencies to make available for review any public records in their possession except those concerning individual privacy. The term public records is defined and does not include "private writings. (Section 2-6-101 MCA.)

If certain business documents were determined to be private writings and not required to become public records, while they still may be subject to discovery through the Rules of Civil Procedure (unless privileged), they would not be subject to the Right to Know provisions of the Constitution because the documents are not public documents.

For example, the Minnesota Environmental Improvement Pilot Program (effective 6-95 to 7-1-99) states, in part:

Section 15. ACCESS TO DOCUMENTS

Subdivision 1. "Public Access. The state may not request, inspect or seize a final audit report, draft audit papers, a self-evaluation form, the notes or papers prepared by the auditor or the person conducting the self-evaluation in connection with the audit or self-evaluation, or the internal documents of a regulated entity establishing, coordinating , or responding to the audit or self-evaluation, other than the report required in section 10, subdivision 2, except in accordance with the agency's policy on environmental auditing as adopted by the agency on January 24, 1995.

Subdivision 2. Third Party Access. After receipt by the commissioner of a report that complies with section 10, subdivision 2, the final audit report, draft audit reports, the self-evaluation form, any notes or papers prepared by the auditor or by the person conducting the self-evaluation in connection

with the audit or self-evaluation, and the internal documents of a regulated entity establishing, coordinating, or responding to the audit or self-evaluation covered by the report **are privileged as to all persons other than the state** provided that the regulated entity is in compliance with its commitments under sections 10 and 12."

Section 10 defines the qualifications for participation in the program by submitting a report to the commissioner detailing the discovered violation and Section 12 describes the preparation of an acceptable compliance plan.

In its self audit law, Minnesota considers the violation discovery report and corrective action plan to be public documents. It has declared the audit reports, documents, notes, etc. to be internal private writings of no interest to and not obtainable by the state, with exception. The internal audit report and documents may be obtained in accordance with the pollution control agency's policy on self auditing.

Once the "protected" documents are acquired or kept by the state, the provisions of Subdivision 2 regarding third party access would likely be improper in Montana given the Constitutional and statutory language regarding public documents.

In legislation effective next July 1, 1996, the state of South Dakota simply states, in part, that:

"The department may not request results of an environmental audit. However, an environmental audit is subject to discovery according to the rules of civil or criminal procedure. If a regulated entity discloses a violation found during an environmental audit, the section of the environmental audit report pertaining to a violation of environmental law, rule, regulation or permit enforced by the department may be summarized for the purpose of disclosure to the department secretary...."

Supporting information

CONSTITUTION

Article II Section 9. **Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II Section 10. **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

PUBLIC RECORDS GENERALLY

2-6-101. Definitions. (1) Writings are of two kinds:

(a) public; and

(b) private.

(2) Public writings are:

(a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

(b) public records, kept in this state, of private writings, except as provided in 22-1-1103 and 22-3-807. (below)

(3) Public writings are divided into four classes:

(a) laws;

(b) judicial records;

(c) other official documents;

(d) public records, kept in this state, of private writings.

(4) All other writings are private."

22-6-102. Citizens entitled to inspect and copy public writings. (1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103 or 22-3-807 **and as otherwise expressly provided by statute.**

(2) Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him on demand a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

(22-1-1103) non-disclosure of a person's library records.
(22-3-807) historical preservation office to keep burial site records confidential.

22-6-104. Records of officers open to public inspection. Except as provided in 40-8-126 and 27-18-111, the public records and other matters in the office of any officer are at all times during office hours open to the inspection of any person."

UNIFORM TRADE SECRETS ACT

30-14-402. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

30-14-406. Preservation of secret. In an action under this part, **a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include** granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."

EXAMPLE:

Regulation of Utilities

Role of Commission

69-3-105. Access to commission records and reports -- protective order. (1) Except as provided in subsection (2), the reports, records, accounts, files, papers, and memoranda of every nature in the possession of the commission are open to the public at reasonable times, subject to the exception that when the commission considers it necessary, in the interest of the public, it may withhold from the public any facts or information in its possession for a period of not more than 90 days after the acquisition of the facts or information.

(2) The commission **may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402**, required to carry out its regulatory functions."

EXAMPLE:

Employee and Community Hazardous Chemical Information Act

50-78-102. Definitions. As used in this chapter, the following definitions apply:

(17) "**Trade secret" means a confidential formula, pattern, process, device, or information, including chemical name or other unique chemical identifier, that is used in an employer's business and that gives the employer an opportunity to obtain an advantage over competitors.**

PRIVILEGE

EXAMPLES:

26-1-801. **Policy to protect confidentiality in certain relations.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part."

26-1-802. **Spousal privilege**...

26-1-803. **Attorney-client privilege**. (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment."

26-1-804. **Confessions** made to member of clergy.....

26-1-805. **Doctor-patient privilege**. Except as provided in Rule 35, Montana Rules of Civil Procedure, a licensed physician, surgeon, or dentist cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

26-1-806. **Speech-language pathologist, audiologist-client privilege**....

26-1-807. **Psychologist-client privilege**. The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client.

26-1-809. **Confidential communications** by student to employee of educational institution. A counselor, psychologist, nurse, or teacher employed by any educational institution...

26-1-810. **Confidential communications made to public officer**. A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure."

26-1-811. Mediator **privilege**. Except as otherwise provided by law, a person acting as a mediator in a family law mediation cannot, without the consent of the parties to the mediation, be examined in a civil action...

26-1-901. Short title. This part shall be known and may be cited as the "Media **Confidentiality** Act"."

26-1-902. Extent of **privilege**. (1) Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.

(2) A person described in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas for refusing to disclose or produce the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his or its business.

CONFIDENTIALITY

EXAMPLES:

82-4-306. **Confidentiality** of application information. (1) Except as provided in subsections (2) and (3), the information obtained by the department from applications for exploration licenses and the information obtained from small miners is confidential between the department and the applicant, except for the name of the applicant and the county of proposed operation. However, all activities conducted subsequent to exploration and other associated facilities are public information and must be conducted under an operating permit.

(2) Any information referenced in subsection (1) is properly admissible in any hearing conducted by the department or in any judicial proceeding to which the director and the applicant are parties and is **not confidential when a violation of this part or rules adopted under this part has been determined by the department or by judicial order.**

(3) The department may disclose information obtained by the department from exploration license applications and from small miners and that is related to the exploration or mining on state and federal lands when the information identifies the location of exploration and mining activities and describes the surface disturbance that is occurring or projected to occur. The department **may not disclose a licensee's or small miner's proprietary geological information.**

(4) Failure to comply with the secrecy provisions of this part is punishable by a fine of up to $1,000."

77-3-308. Limitation on public inspection rights. The department (DEQ) may withhold from public inspection any information obtained from a coal mining lessee or permittee under this part if the information relates to the geology of the mining lease or permit. The withholding is effective for as long as the department considers it necessary either to **protect the lessee's or permittee's economic interest in the geologic information against unwarranted injury** or to protect the public's best interest."

80-8-107. Public information. Except as provided in Title 80, chapter 15, the department as it deems proper may, alone or in cooperation with other state or federal agencies, publish information regarding aspects of the use and application sections or registration sections of this chapter. This information **cannot disclose operations of selling, production, or use of pesticides by any person**."

80-10-210. Licensee reports -- **confidentiality** -- inspection -- failure to file. (1) Information contained in the reports required by 80-10-207(3) shall be held confidential by the department. Summary data published by the department shall be in a form that will not disclose details of any operation or business.

80-15-108. **Confidentiality**. (1) The department and the department of environmental quality shall maintain the confidentiality of data declared confidential by EPA and chemical registrant data and information protected from disclosure by federal or state law.

(2) The department of environmental quality shall comply with the requirements of 75-5-105 and the department shall comply with the requirements of 80-8-107 and 80-10-210, except as otherwise provided by this section."

ATTACHMENT E (cont.)

EPA POLICY ANALYSIS

Protection Afforded:	**EPA POLICY**
	Punitive penalty mitigation by the Department for voluntary disclosure and not recommend criminal prosecution or request audit to initiate civil or criminal investigation.
Environmental Audit Definition:	**Environmental Audit** means: a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. **Environmental Audit Report** means: the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.
Conditions for Penalty mitigation and/or immunity:	1. Voluntarily disclosure.
	2. Violation not knowingly or intentionally committed
	3. Disclosure of violation within 10 days.
	4. Violation discovered by regulated entity not someone else.
	5. Must correct violation within 60 days..unless Department determines that the additional time is needed.
	6. Prevent Violation from recurring.
	7. No pattern of past violations.
	8. Violation not serious and does not present an imminent or substantial harm.
	9. Regulated entity cooperated.
	10. Violation does not violate any judicial or administrative order.
	11. Due diligence required.

ATTACHMENT F

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ATTACHMENT F

EPA POLICY / MODIFIED SOUTH DAKOTA BILL

	EPA POLICY	MODIFIED S.D. BILL
Protection Afforded:	Punitive penalty mitigation by the Department for voluntary disclosure and not recommend criminal prosecution or request audit to initiate civil or criminal investigation.	Immunity from civil or criminal penalties for violations found, disclosed and properly corrected. The Department may not request the environmental audit but the audit is subject to discovery according to the rules of civil or criminal procedure. Audit information pertaining to violations discovered and corrected as a result of the environmental audit may not be used against a regulated entity in any administrative hearing or judicial action.
Environmental Audit Definition:	**Environmental Audit** means: a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. **Environmental Audit Report** means: the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.	**Environmental Audit** means: a formal, written, voluntary, scheduled internal assessment, evaluation or review, not required by law, rule, regulation, or permit, that is conducted by a regulated entity or its agent, and initiated by the regulated entity for the purpose of determining compliance with environmental law, rule, regulation, or permit enforced by the department.
Conditions for Penalty mitigation and/or immunity:	1. Voluntarily disclosure.	1. Environmental audit is voluntary.
	2. Violation not knowingly or intentionally committed	2. Environmental audit cannot be used as a defense to civil or criminal action if the regulated entity has willfully and with knowledge violated state or federal environmental law, rule, regulation, or permit.
	3. Disclosure of violation within 10 days.	3. The department may not pursue civil penalties or criminal prosecution for violations found during an environmental audit within 30 days after the violation is discovered.
Conditions for Penalty mitigation and/or immunity continued:	4. Violation discovered by regulated entity not someone else.	4. Violations discovered prior to the time a regulated entity has disclosed these violation in writing to the department are not covered by this policy.
	5. Must correct violation within 60 days..unless Department determines that the additional time is needed.	5. A written compliance schedule must be negotiated between the department and the regulated entity to promptly correct the violations disclosed. If the regulated entity has not corrected the violations according to the negotiated compliance schedule the environmental audit may not be used as a defense to a civil or criminal action.
	6. Prevent Violation from recurring.	6. The regulated entity must take steps to prevent recurrence of the violation.

	7. Violation must not have occurred previously within the last 3 years or be a part of a pattern of violations by the facility's parent organization within the last 5 years.	7. An environmental audit may not be used as a defense to a civil or criminal action if a regulated entity has established a pattern of repeatedly violating environmental law within 3 years prior to the date of the disclosure at the same facility.
	8. Violation did not result in any serious actual harm or present an imminent and substantial harm or violate the terms of any judicial or administrative order or consent agreement.	8. If violations caused imminent and substantial damage to human health or the environment this policy does not apply.
	9. Regulated entity cooperated.	9. The regulated entity must cooperate.
	10. Violation does not violate any judicial or administrative order.	10. Documents, communications, compliance data, reports, or other information required to be collected, developed, maintained, or reported to the department according to state law, rule, regulation, or permit are not covered by this policy.
	11. Due diligence required.	11. **No Due diligence requirements**
Conditions for Penalty mitigation and/or immunity continued:		12. An environmental audit may not be used to prevent the department from carrying out its statutory or regulatory functions.
		13. If a state program is required in writing by a federal agency to assess penalties for a violation as a condition to maintaining primacy over a federally-delegated program this policy does not apply.
		14. Nothing in this section [section 3 immunity from imposition of civil or criminal penalties for violations found and disclosed] discourages uninterrupted or continuous auditing.
Use of Environmental Audit information:		
	1. Department may not recommend criminal prosecution or request audit to initiate civil or criminal investigation.	1. Department may not request the environmental audit but the audit is subject to discovery according to the rules of civil or criminal procedure. Audit information pertaining to violations discovered and corrected as a result of the environmental audit may not be used against a regulated entity in any administrative hearing or judicial action.
		2. If a regulated entity discloses a violation found during an environmental audit, the section of the environmental audit report pertaining to a violation of environmental law, rule, regulation, or permit enforced by the department may be summarized for the purposes of disclosure to the department. The summary must include: violation type, location, date found or disclosed if known and who conducted the audit.

ATTACHMENT G

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ATTACHMENT H

ENVIRONMENTAL SELF AUDIT WORKING GROUP RESULTS AND FINDINGS

November 1996

The Environmental Self Audit Working Group process was not intended to develop a consensus document or policy, but to analyze the confidentiality and immunity issues raised in the debate over HB 412 during the 1995 Legislature.

A. Findings and areas of "agreement"

1) Voluntary environmental self audits should be encouraged.

a) regulatory inspection agencies need cooperation from businesses.

b) earlier detection can prevent pollution.

c) it is a proactive business effort on its own behalf for public benefit.

2) As an incentive, penalties should be negotiated, reduced, and/or eliminated (with exceptions) for those violations discovered as the result of environmental audits and which are reported and promptly corrected.

B. Issues of contention

1) Whether an environmental self audit policy should be accomplished by statute or by administrative policy.

a) if by statute, whether or not a sunset provision is needed.

b) if by policy, whether or not the December 1995 federal EPA self audit policy is sufficient.

2) Total immunity or partial immunity as incentives to self audit.

a) whether or not civil, administrative, and criminal penalty immunity is required

b) whether or not identifiable economic benefits gained by non-compliance should be waived.

c) whether or not criminal penalties should be waived, or should be waived except for what specific circumstances.

3) Privilege of audit information as an incentive to self audit.

a) whether or not audit information should be retained by the facility, made available to the agency only or made available to the agency and the public.

b) under what circumstances could information be withheld.

ELEMENTS OF AN ENVIRONMENTAL SELF AUDIT POLICY

With varying degrees of support from the members of the working group, staff has identified the following elements which need to be addressed in any such public policy.

1) Environmental audits should not be used fraudulently as shields from prosecution. (Bad actor clause)

2) Audit policy should not jeopardize state primacy relationships with the federal government for

delegated federal programs. Language considered to be a “statutory bar to enforcement” may be problematic for federally delegated programs.

3) Audit information should/should not be subject to routine information requests by regulatory agencies.

4) Reported violations should be corrected/remediated to the satisfaction of the regulatory agency and verification should be possible. Timeliness is an issue.

5) Reported violations which result in (your defined adjective here) damage to human health or the environment should not subject to the policy.

6) Policy should not prevent third party litigation to recover damages to person or property caused by violations of law.

7) Impact of policy should be measurable.

8) Definitions of audit and audit report must be clear and concise.